SOVEREIGN COLONIES

I

What is an Australian?

UNTIL a very short time ago the only answer to this question would in law have been that there is no such person. Popular language spoke of "Australians," but in a way far too loose and undefined to serve as a legal conception. An "Australian" simply meant a person who had an intimate connection with Australia, involving some residence there at not too remote a period.

Birth in Australia was not necessary. None of the earlier colonists were born in Australia. Long residence in Australia was scarcely necessary, and certainly not sufficient. A Manchester man who had spent his early years from two to twelve in New South Wales would not at fifty be termed "an Australian." Neither did domicile in Australia enter into the popular calculation: the public does not know what domicile is. The possession of estates and property in Australia formed an element in the popular idea, but certainly did not constitute the whole content of it; the carrying on of business in Australia formed another element; well-known sympathies and likings formed another. The whole idea was floating and uncertain. It was merely, to use a descriptive phrase, varying with the mentality of the speaker to say that such and such a person was "an Australian."

In law there was no foundation for the term, any more than there is for the term "a Scotsman," or "an Irishman." There are no Scotsmen; there are no Irishmen. In law there is no differentiation between any of the subjects of the Crown. A denizen of Madras, if he comes to London and acquires the necessary slender justification by residence, can elect and be elected to the House of Commons. A native of British India may be a Secretary of State, a peer, and sit and vote in the House of Lords. The only exception to this generous rule, which decrees that every person who lies at the unlimited power of the Crown shall have all the constitutional rights of modifying the way in which that power shall be exercised, is to be found in the case of the East Indian "protec-

torates," so styled. It is only by the most transparent of fictions that these are held not to lie at the absolute disposal of the Crown. In fact, the British "Resident" is the only effective ruler of such a "protected" country: the will of the British Government prevails there, as clearly as, and more effectively than, it prevails in Lancashire. Yet the English judges persist in seeing in the shadowy and powerless Sultans more or less independent rulers because the Foreign Office tells them so (*i. e.*, certifies these territories to be "foreign"), and in consequence the rulers and people alike of these countries do not enjoy in the courts the rights of British subjects, though they are subject in effect to all their obligations and have lost the moral protection of international law.[1] In the Indian peninsula this peculiar state of things has long existed; probably by this time it has deprived the so-called "native states" of every shred of international status. In the Malay peninsula and in Zanzibar the process has perhaps not quite proceeded so far. It is possible that some spark of independence remains in these districts, though there is nothing to differentiate their daily administration from that of a Crown colony, and all their foreign relations are conducted by Great Britain. Governor Jervois of Singapore, who hesitated at first whether to annex the Malay States or not,[2] decided that it would be better to "protect" them — "as it would be very inconvenient that these people should acquire the rights of British subjects."

By this thin fiction, therefore — for it is nothing better — Britain rules (and rules, I venture to think, well) in these localities without any but a moral responsibility to the inhabitants: a situation abhorrent to English constitutional principle. Foreign countries enjoy the protection of international law. British subjects enjoy the protection of constitutional law. But the inhabitants of these places enjoy neither — and (as in Baroda, Selangor, and Manipur) their very rulers are subjected arbitrarily to the criminal laws invented *ex post facto* for the occasion by their real masters.

But this is a digression. Malayans and Cochinese, and their congeners, though subject to the power of Britain, are not British

[1] *Cf.* the Manipur Case, where the "foreign" potentate was tried, condemned, and slain under no law whatever.

[2] See "Debt-Savery in the Malay Peninsula," 26 LAW MAGAZINE & REVIEW (London), 312.

subjects. Every other person born within the territories, subject to the power of Britain, is. And there is no distinction between them. The sole criterion is birth within the allegiance — which includes of course birth within the lines of a British army,[3] and excludes the issue of foreign envoys and invaders.

An Australian is born within the allegiance no less and no more than a cockney. A Parsi born in Bombay or a Tamil born in Singapore stands upon an absolute equality with him. None of them have any secondary, subordinate, or co-ordinate allegiance, from the viewpoint of English law.

There never has been any legislation to affect this broad principle and to attribute to individuals any special allegiance to any particular division of the royal dominions. Allegiance is personal. It is allegiance to the King; and while William IV was King of Hanover, Germans voted freely at English elections, for they were the fellow subjects of Englishmen.[4]

It was declared by the House of Commons in 1879, on the report of a Select Committee appointed by the Law Officers, that a member (Sir B. O'Loughlin) had vacated his seat by the acceptance of office under the Crown: to wit, as Her Majesty's Attorney General for Victoria.[5]

The establishment of the so-called "Commonwealth of Australia" — a federation of the Australian colonies — in 1900 was oddly thought by some continental publicists to have introduced a change in this respect. Had such been the case, it must have been the case thirty years previously, when Canada was federated into a "dominion." But of course nobody even thought of such a thing. The mere federation of colonies introduces no change into their relations with the metropolis.

If authority were wanted to show that there is no legal bond uniting individuals to particular sections of the empire, one would cite *G. Gibson & Co.* v. *Gibson*,[6] decided quite recently, in 1913. The English courts will give effect to the judgments [7] of foreign courts in cases where the defendant is a subject of the foreign power

[3] By statute, it includes also the children (formerly also the agnatic grandchildren) of British parents.

[4] See Isaacson *v.* Durant, 17 Q. B. D. 54 (1886).

[5] 245 HANSARD'S DEBATES, 1104 (1879).

[6] [1913] 3 K. B. 379.

[7] For a liquidated amount.

whose courts they are. They would give effect to the judgment of a French court against a Frenchman. They were now asked to give effect to the judgment of a Victorian court against a "Victorian." The courts in effect said that there was no such thing. They would give effect to a Victorian judgment against a British subject — or a French subject, for the matter of that — domiciled in Victoria. But this defendant was not so domiciled. It could only be said that he was born in Victoria. But this made him a British subject, not a Victorian subject. The analogy of a foreign country thus failed, and the plaintiff was told that he could not sue a British subject in Victoria merely because he happened to be born there.

It would probably be untrue to say that the decision of any French tribunal would be accepted and enforced against any Frenchman. A Parisian sued in a New Caledonian court might probably have a successful defence in England to an action on the judgment. It must probably be the judgment of a court having, on French principles, jurisdiction in the matter. Thus an American, all of whose connections and citizenship are in Pennsylvania, would hardly be held liable, merely because he is an American citizen, to implement in England a judgment rendered in Arizona. It would be necessary to show some principle common to all the courts of his nationality which subjected him to the Arizona jurisdiction. But the principle was laid down without much adverting to the fact that there may be different jurisdictions in one political nationality. It is just possible that it may have been thought that the judgment of any court of the defendant's political sovereign ought to be enforced in England against him. His sovereign's court ought to know best whether it had jurisdiction over him or not. It is difficult to participate in such an attitude, for it seems to invest the most obscure of local courts with an unlimited jurisdiction (so far as English courts are concerned) over all and sundry the subjects and citizens of the realm. The better opinion surely is that the national judge is really accepted as a valid judge only within the limits of his jurisdiction: it is not for him to say what they are.

It does not therefore follow from *G. Gibson & Co.* v. *Gibson* that a New Caledonian judgment might be enforced in London against a Parisian, whilst a Victorian judgment would *not* be enforced

against a Londoner. What the case establishes is simply that there is nothing corresponding to political nationality which can form a valid claim to jurisdiction on the part of a self-governing colony. It has no subjects or citizens.

So, at least, the law stood before the signing of the Versailles Treaty of Peace in 1919. That remarkable instrument was drawn up in a remarkable way. The British King was one of the High Contracting Parties, and His Majesty was represented for the purposes of signature by five Scots and English gentlemen and "for the Dominion of Canada" by two more, "for the Commonwealth of Australia" by other two, "for the union of South Africa" by another pair, "for the Dominion of New Zealand" by a single personage, and "for India" by H. H. the Maharaja of Bikanir and Mr. Montague. Bikanir is a so-called "native state," technically foreign [8] territory: it may be important to note this.

It is really difficult to see what is the grammatical sense of this phraseology. What is the meaning of a principal being represented by A. for Z.?

Of course the underlying truth is that the old conception of sovereignty has gone by the board. But we are not dealing, and the treaty was not dealing, with underlying truths, but with definite legal conceptions. And so long as a single individual allegiance to the person of the King is the theory of British constitutional law, the engagements of the King must be made in accordance with the theory. Two courses alone seem open to the interpreter.

Either the mention of signature "for" the colonies was ornamental only, or there is no longer a single individual allegiance throughout the British dominions.

The former course seems the preferable one. Signature by A. on behalf of N. "for" Z. may, without straining language beyond the bounds of possibility, be supposed to mean "in honour of" Z. So in America one "names" a child "for" a relative, or a battleship "for" a city. This would certainly be the interpretation adopted if a plenipotentiary had signed on behalf of the King "for Scotland."

[8] The Maharaja is not constitutionally a British subject, yet he cannot choose but do what the British government tells him. *Internationally* there is no doubt that Westlake was right in declining to recognize that such princes have any shred of international status. *Constitutionally* the matter may have a different complexion.

But the treaty went further. Passing over the curious wording according to which six German gentlemen purport to sign in the name of "the German Empire and of each and every component State" (intended to represent something not obviously identical, *viz.*, "Germany"), we find the "Covenant of the League of Nations" declaring in its first Article and in its Annex that among its charter members are the British Empire, Canada, Australia, South Africa, New Zealand, and India. The curious feature leaps to the eye that all but the first of these are placed in what lawyers and compositors call the second margin: *i. e.*, they are spaced back so as to suggest that they are included in the empire. What does not leap to the eye is that there is no mention of the United Kingdom; that Newfoundland, though a self-governing colony, is not included; and that India is an ambiguous expression, for part of Imperial India is constitutionally within the British dominions and part is not. And it appears, likewise, on reflection, that although the charter members are said in the covenant to be "signatories" of the treaty, the list of signatories does not literally comprise either "The British Empire" or "Canada" or "Australia" or "New Zealand" or "India."

Does it not seem very arguable that by "spacing back" the names of the colonies the intention was to emphasize that the sole British signatory of the treaty was the King? No doubt His Majesty signed in different ways, but not in different capacities. He is not King of Canada or of South Africa; and if he is Emperor of India it is quite clear that that is an ornamental title merely (it was conferred as such on Queen Victoria and her successors by an Act of the British Parliament). The charter members of the League are the victorious signatories of the treaty — and one of them is the King of the United Kingdom of Great Britain and Ireland, and of the British dominions [9] beyond the seas, Emperor of India. Canada is not a signatory: two gentlemen signed the treaty "for Canada" but *representing* "the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India" — exactly the same person. Is it not the probable intention that King George is the sole British signatory of the treaty, and the British Empire (comprising, it is true,

[9] "Dominions" is here used in its proper sense, including all the possessions of the Crown, self-governing or not.

and specially naming, Canada, Australia, South Africa, New Zealand, and India) the sole British member of the League of Nations?

The alternative is a very serious one. It is that the British Empire has broken up. If the King's plenipotentiaries sign "for Canada" and thereby bind Canada and Canada only, it is clear that a new state, semi-sovereign at least, and probably wholly sovereign, has joined the family of nations. Mr. Berriedale Keith — than whom there is no higher authority — seems to incline to this solution in the *Journal of Comparative Legislation*,[10] doubting whether the admission of the colonies to sign the Treaty of Versailles is not incompatible with the constitutional theory of the unity of allegiance. Dr. Keith's opinion would, indeed, be nearly conclusive, only that it is casually and not very positively expressed.

We have hitherto not noticed the provisions of Article 1 of the Covenant, which allows any "fully self-governing state, dominion, or colony" to become a future member of the League. This certainly suggests that the British colonies and India are intended to be independent original members: but its meaning is far from clear, because the article immediately proceeds to speak of the intention of such state, dominion, or colony "to observe its international obligations." Now a colony[11] has no international obligations, any more than you or I have. It would therefore seem that only states and colonies enjoying a definite international status are here intended. That is, they must be sovereign or semi-sovereign.

And this does not tell very strongly as an argument either for or against the semi-sovereignty of the British colonies. If they *are* semi-sovereign (or, of course, if they are sovereign) then they are included in the list of members. If they are not, then they may be included when they are; on the footing that they are not "named in the Annex" for *this* purpose, but only as constituents of the

[10] 3 Series, vol. 2, part 4.

[11] "Dominion" is a misleading and ambiguous word, the sole object of which is to gratify the *amour propre* of large colonies. It is constantly being confused with "dominion" in the wide and proper sense of territorial possessions. Its use dates from a very recent period. As a proper noun it is the special title of Canada, — of course it goes back to 1870 at least, — but as a common noun, meaning "large self-governing colonies," it would be surprising if an instance could be found of it antedating the twentieth century. Its official use is very recent indeed.

empire.[12] The clause may be looking wholly to the future. That they are not members of the League,[13] except as components of the British Empire, seems strongly supported by the consideration that it is in the highest degree improbable that disputes between the colonies and the mother-country should be subjected to diplomacy, arbitration, and the mediation of the League Council. Moreover, would their votes be excluded as "parties to the dispute" in case of a British dispute under Article 15? And how can they be said to have "existing" political independence under Article 10? Surely India has no independence, at any rate; yet if Canada is a member, so is India. But here we may leave this branch of the subject with the sole remark that when there is a dispute or doubt as to whether an integral state has impaired its sovereignty, the presumption is always in favour of the *status quo*.[14]

II

Colonial Nationality

What is the position of the colonies so made sovereign or semi-sovereign, if the Treaty of Versailles has changed their status, in respect of population? If they are nations, who possesses their nationality?

If they are only semi-sovereign, the question is just as insistent as in the case where they are sovereign. For the very essence of a

[12] Article I of the League Constitution is not artistically framed. It first makes Members of "the *Signatories* . . . named," and then provides for the future admission of any "*State, Dominion or Colony* not named." There might be colonies named which are not signatories, nor named *as such*.

Again, in providing for future admissions, the Article speaks of the admission of "fully self-governing States, Dominions or Colonies" which intend to observe their international obligations. As we have seen, these words are unintelligible in the case of a colony. Are we to try to construe them in some occult way as applicable to colonies? Or are we to suppose that by "colonies" is meant internationally independent powers? Or are we to apply the words to "fully self-governing states" alone?

[13] They are clearly not "Allied or Associated Powers." *Cf.* German Treaty of Peace, § 296 (4 (e)).

[14] As to the power of the Crown to grant away the high functions of government, and thus to create Counties palatin of the Continental pattern, see *per* Lord Brougham in Dyke *v.* Walford (5 Moore's P. C. 434 (1846)). It would seem that the whole of the old learning regarding the relations of vassals to suzerains will now become of the first importance in determining the legal relations of the colonies to the United Kingdom. *Mi-souverain* states, which had been thought obsolete, have reappeared in a very unexpected form.

semi-sovereign state is that its people do not have the nationality of the suzerain nor are they his subjects.[15] If Britain's action toward the great colonies has made them sovereign or semi-sovereign, then it has deprived their people of British nationality.

It seems to be indisputable that His Majesty can do this. The Crown can cede territory and dissolve allegiance. It may be doubtful whether the tie of sovereign and subject can be severed in individual cases without the subject's consent. But when it is severed along with territory, there is no doubt. The Transvaal colonists, before 1881, were in law British subjects. The Queen granted them independence and they ceased to be such. Individuals who objected had no choice; and the question of who were comprised in the grant was but little doubtful. It was "the inhabitants" of the Transvaal.

But when we have no such definite grant or treaty, but the new sovereignty arises tacitly and by force of circumstances, the question of what persons have been extended from the old sovereignty, or at least from direct dependence upon it, becomes very puzzling. No doubt persons domiciled, in the strict Anglo-American sense, in the new state must be supposed to wear its nationality. But what about persons born there? and what of residents whose commorancy falls short of domicile? After all, "Australia" is an expression which, if used in conferring independence, denotes some body of persons, and not merely a tract of territory. What persons are they? The facile answer would naturally be, "The inhabitants;" but there seems to be no very solid precedent or reason for it. "Inhabitants" is a word often used, it is true, in explicit concessions. That does not say that it is to be read into implicit ones. Has it even been laid down authoritatively that a cession of territory carries the "inhabitants"? Perhaps, after all, it might be wisest to recur to the old and well-rooted criterion of birth: those are subjects of New Australia who are born in Australia. It is a very concise and certain criterion, and would cover most of the inhabitants. Its defect would be that it is inconsistent with the theory of allegiance. A person who was born within the allegiance of the King is to lose the benefits of that allegiance, although living perhaps in the United Kingdom, and altogether undesirous of

[15] The Ionian Ships, 2 Spinks' Ecc. & Ad. Reports, 212 (1855).

being attributed to Australia. On the whole, the text of inhabitancy rather than that of birth seems certain to be adopted in practice.

Any endeavor to establish a double allegiance to Australia and the empire is doomed to failure. No man can serve two masters. If a nation acquires an international status, it is impossible that its subjects should be internationally in the same position as the subjects of another country. They may receive equal treatment, by municipal concession, but they cannot be considered in the same light as subjects by foreign countries.

It may be desired by some that Australia should have a measure of sovereign independence, and yet that the unity of British citizenship should not be impaired. It is a desire for a chimera, and it cannot in the nature of things be justified.

III

Suits between Colonies

Can one British colony sue another? We are so familiar with the principle of state sovereignty that we forget that the colonies are not sovereign: not even (unless the Versailles Treaty has worked a change) *mi-souverain*. Nor are they corporations. The government of the colony is simply the King acting by a particular set of agents. The suit of one colony by another colony would be like the suit of the cook by the butler because too much was spent on coals, or the suit of the War Office by the Board of Agriculture because men who might be soldiers were kept to work at the harvest.

The colony is merely a particular aspect of the royal power. "The adjustment of interests as between the different parts of the Empire is in general," says Harrison Moore, "not a matter for the consideration of the Court." [16]

The cases cited by Professor Caldwell in the *American Journal of International Law*,[17] in which one plantation appears to sue another before the King in Council, are all to be explained as not

[16] Commonwealth of Australia, 74, citing Bateman's Trusts, 15 Eq. 355 (1873); Oriental Bank Corporation, 28 Ch. D. 643 (1884); Monk *v.* Ouimet, 19 L. C. J. 71 (1874); *sed cf.* Ontario *v.* Mercer, 8 A. C. 767 (1883); St. Catherine's, etc. *v.* Reg., 14 A. C. 46 (1888). See as to federal colonies Maritime Bank of Canada *v.* New Brunswick, [1892] A. C. 437.

[17] Vol. 14, pp. 38, 39.

being really judicial determinations, but merely the exercise of administrative power, though proceeding on more or less judicial lines.[18] This seems to be the view of Professor Caldwell himself; for though he speaks of the Privy Council as a court (and sometimes, as at *ibid.*, p. 40, terms its Board of Trade a "high court"), he appears to recognize that its decisions had all the character of administrative determinations both in their nature and results. His Majesty, that is, decided the proper course to be taken, sitting in the Privy Council, after that body had maturely examined the case, and had possibly consulted the judges. It is as though the master of a large establishment, who might perfectly well issue an arbitrary order, found it best to hear his coachman and gamekeeper as to their use of ground at the back of their respective cottages — perhaps with the aid of the family solicitor.

Professor Caldwell then, with some surprise, finds this administrative jurisdiction of the Privy Council disappearing entirely for a century. But there is nothing surprising in the matter. The decay of the jurisdiction coincided with the transfer of the colonies from the Board of Trade and Plantations of the Privy Council to a Secretary of State. It was a purely administrative jurisdiction, and a new administrative department was ultimately created to deal with colonial administration. The creation in 1801 of a third Secretaryship of State, styled "for War and the Colonies," was only the climax of the system of ministerial control which provided the Crown with a simple and constitutional channel for the exercise of the prerogative. Professor Caldwell thinks that the jurisdiction arose again on three occasions in the nineteenth century, — in 1846, 1872, and 1886. In fact these cases, so far as we have been able to consult them, were of a different complexion. The modern Privy Council cases to which Mr. Caldwell refers do not seem capable of being linked into the old administrative ones at all. They appear to be dry legal cases of positive law. In the first (1846, the *Cape Breton Case*[19]) there was no suit by Cape Breton against Nova Scotia, and could not be, for the very question was

[18] This seems to be only partially true of the first case cited; for the matter was referred to the chief justices for their opinion and was argued with great solemnity. It is interesting to see the non-severance of administrative and judicial powers persisting into the eighteenth century.

[19] 5 Moore's P. C. 259 (1846).

whether the colony of Cape Breton had any separate existence. Captured from France in 1763, it had been annexed to Nova Scotia. But in 1784 certain provisions had been made by the Crown for the summoning of a separate Assembly for Cape Breton,[20] and the proceedings in the Privy Council were taken by individuals (relying on *Campbell* v. *Hall*[21]) to have these provisions carried into effect. It was not a case of two sets of the King's servants disputing as to the meaning of their master's orders; it was a case of making the King's servants do their alleged duty. The second case, described as "the Pental Island Case, between New South Wales and Victoria in 1872," we have been unable to trace. The question of the boundary between Manitoba and Ontario which Professor Caldwell cites, was referred to the Privy Council under the Statute 3 & 4 Will. IV, c. 41, which is so general in its terms as to include the reference of any questions, and which creates a purely consultative jurisdiction. It cannot therefore be cited as an instance of the old prerogative practice. The decision, says Keith,[22] was "accepted" by the two provinces and embodied in the Imperial Act 52 & 53 Vict., c. 28. It was not, therefore, advice to the Crown as to the exercise of its prerogative, like the old Privy Council "decisions." A disputed boundary between New Brunswick and unconfederated Canada arose in 1851, and it is interesting to note the mode of settlement. This was by arbitration —the arbitrators to report to the British government. Both parties chose (if I remember rightly) Dr. Lushington as the oversman. On the report of the arbitrators, the boundary was enacted as recommended by them, by Statutes 14 & 15 Vict., c. 63, reciting that "it is *expedient* that the boundary should be settled in conformity with the award." This shows that there was no question of legal right, but only of expediency. Colonies are not corporations.

It remains to deal a little more in detail with the statutes and cases which look like cases of suit brought by one colony against another.

The British North America Act (1867), which confederated

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[20] In 1820 the separate sub-governor and council for Cape Breton were likewise suppressed, and the district merged (so far as the Crown could merge it) in Nova Scotia.

[21] 20 State Trials, 239 (1774).

[22] 3 RESPONSIBLE GOVERNMENT IN THE DOMINIONS, 1383.

Canada, made no provision for such suits. But an act passed in Canada, under its provisions, in 1875 provided shortly that the Supreme Court of Canada might have a certain jurisdiction between colonies. The wide jurisdiction conferred upon it to decide any question referred to it by the Governor-General appears to be consultative only; but it has a facultative jurisdiction as between Canada and a province of Canada, or between two provinces. This is doubtless in imitation of the powers of the United States Supreme Court. And it is important to remark that it required a legislative interposition. More important is it to remark that no coercive jurisdiction was conferred.[23] The Supreme Court was placed simply in the position of an arbitrator — and (most important of all) it did not necessarily follow that the colonies were thus tacitly invested with legal rights and a jural personality. For such arbitrated disputes need not involve the assumption that legal rights were concerned. Had the jurisdiction been coercive, it must infallibly have been intended to determine legal rights. As we see in our own day, a tribunal to determine what is desirable as between nations or classes, and not what is legal, has no chance of acceptance as a coercive authority. It becomes a legislature if it is so accepted.

Had the jurisdiction been coercive, it must have followed that a series of legal rights was attributed for the first time to each colony. Previously, the individual colonists had rights; the Crown had rights; but the colony, as such, had none. But there is no use in suing in a coercive jurisdiction unless you have a definite right to assert. Consequently, the admission of the Canadian provinces to sue in a coercive court would have been a tacit clothing of the Canadian provinces with rights — though it could not be clear exactly what they were. They would have become juridical persons. Previously, if the King (*i. e.*, the imperial government) had laid down boundaries for Quebec and Ontario, it was for the good of the empire that he did so. Individuals might complain if crown officials disregarded these boundaries, once laid down, to their prejudice. But colonies could not complain, for they were mere

[23] When the so-called Exchequer Court was created to decide cases to which the federal authority was a party, it was not, it is believed, expressly stated that such cases of dispute *as to legal rights* might exist with provincial authorities. The assumption seems to have been subsequently made, but, it would appear, incautiously.

modes of exercising the powers of government. If the forester settles to bring in fifty rabbits for the royal dinner, the cook cannot sue him, however shamelessly he fails to act up to his intentions. The colony had no *raison d'être* of its own independently of the King (or, if we put sentiment for legality, of the People of the British race). To allow one colony to sue another was to allow the King to sue himself, and to pay into one pocket (less lawyers' fees) what he took out of the other.

In itself, the Canadian legislature of 1875 was not inconsistent with this. Persons carrying on the King's government in Canada were now provided with a judicial way of settling their official disputes by mutual consent. It did not follow that the colonies were clothed with a juridical personality, and regarded as entities in themselves, and not as being mere geographical expressions for various districts in which particular forces of government respectively prevailed.

It is interesting to notice that this last conception was emphatically and authoritatively proclaimed at that very moment in a case which is of the highest interest in this connection.[24] This was *Sloman* v. *The Governor and Government of New Zealand*.[25] The action was brought by a German of Hamburg — an emigration agent who considered himself aggrieved by acts of the colonial authorities. He applied for "substituted service" of English process on the defendants — not, presumably, having much desire to voyage to the antipodes to sue them in their own courts. The Common Bench refused the application (Coleridge, L.C.J., and Archibald, J.). Mr. Sloman appealed to the Court of Appeal, and James, Mellor, and Bagallay, L.JJ., all adhered to the view that nothing could be done. There was no defendant. "There is no such corporation as the Governor and Government of New

[24] See and distinguish Newfoundland *v.* Newfoundland Ry. Co., 57 L. J. P. C. 35 (1888). A contract to build a railroad had been made between a colonial government and a corporation. The corporation was admitted to sue the government — but the proceedings may have taken the appropriate form of a suit by or against the Queen. Or Newfoundland legislation may have provided for the virtual incorporation of the government. It is not apparent from the report what form the proceedings took. The case was of course purely a colonial one; the Privy Council decided it exactly as if they were sitting in Newfoundland as the ultimate court of appeal there. Examination of the Newfoundland Act, 9 May, 1881, incorporating the railroad, might then throw some light on the subject.

[25] 1 C. P. D. 563 (1876).

Zealand," said the Bench: and as the Governor was not sued personally, there was no one to sustain the rôle of defendant. Presumably, a petition of right might have lain to the Crown. The case arose out of contract: it was an emigration agreement to which the parties were Her Majesty the Queen "on behalf of the colony," the colonial agent-general in London, and Messrs. Sloman and Loesner. The case is conclusive that there was no such thing as "New Zealand" in the mind of the judges, except as an island in the South Seas, ruled in a particular and popular way by the agents of the Queen. Under the Canadian Act of 1875, so inconsistent in its tendency with this view of a colony as a mode of government, very few cases have actually been decided. It may be well briefly to indicate a few which seem to lie within its scope.

British Columbia v. *Canada* [26] was a reference to the Supreme Court of a question which had arisen on the construction of the Canadian Pacific Railroad, and which a British Columbian Act had provided should be referred for decision to that court. It was clearly not a case of coercive jurisdiction over the province or over Canada. Neither were the cases which involved Ontario and Canada reported in the Law Reports.[27] The first of these was referred to an Ontario court in accordance with the provisions of the Ontario Act, 53 Vict., c. 13; the second involved the famous controversy about the application of the federal "Temperance Act, 1886," and was referred by the Viceroy under the Canadian Act, R. S. C., c. 135. The third (a dispute about lakes) was referred under an Ontario Act, and the fourth (concerning fisheries) in the same way as the second. Canada, Ontario, and Quebec referred questions arising under certain Indian treaties to the arbitrators, with appeal to the court, by similar special statutes of Canada, Ontario, and Quebec.[28] Manitoba and Canada referred certain financial adjustments to the court,[29] by Statutes 48 & 49 Vict., c. 50 (Canada), 49 Vict., c. 38 (Manitoba). Prince Edward Island and Canada referred questions arising out of the Temperance Act in the same way.[30] A difference as to the rights of provinces to

[26] 14 A. C. 295 (1888).
[27] [1894] A. C. 189; [1896] A. C. 348; [1898] A. C. 247, 700.
[28] [1897] A. C. 199.
[29] [1904] A. C. 799.
[30] [1905] A. C. 37.

create "Queen's Counsel" was settled in 1898 by the Privy Council — but, again, simply under a reference by the Ontario Governor to the Ontario courts in accordance with Ontario law. A question between Alberta and Canada was similarly referred prior to 1915.[31] In fact the only case reaching the Privy Council, in which two co-ordinate colonies have joined in a reference, apart from the federal power, is apparently that of *Ontario* v. *Quebec*,[32] a question of school funds, and itself referred under special legislature, and perhaps the *Ontario* v. *Manitoba* case of 1886 mentioned by Mr. Caldwell.

All the cases of this type, therefore, resemble rather arbitration than judicial decision. The jurisdiction is not coercive. The colony or province is not clothed with a juridical personality which can *claim* protection for rights. It is all a matter of settling official susceptibilities amicably and by mutual consent. "The answers are only advisory and will have no more effect than the opinions of the law officers" — per Lord Loreburn, C., in *Ontario* v. *Canada*.[33] But they *look* very like the creation of a real personality in the colony or province and they chime in very well with the growing self-consciousness of the colonies. And so we find that the Australian "Commonwealth" Act of 1900, throwing off the restriction that the legislatures[34] must concur in the reference to the court, gives a coercive jurisdiction to the High Court of Australia, and thus clothes the several Australian colonies with a juridical personality, with the corollary of legal rights.

And in 1914 we get the first real case of a legal right being admitted to inhere in a British colony as against another colony. The boundary line between the colony of South Australia and the colony of Victoria was originally laid down by Her late Majesty by reference to astronomical observations. It was an imaginary line. A survey had subsequently laid it down by metes and bounds — inaccurately. The question was, which was the true boundary. Now, in contemplation of law, it did not matter — except to in-

[31] [1915] A. C. 363.

[32] [1903] A. C. 39.

[33] [1912] A. C. 571, 589. The practice of stating questions in this way has often been adversely commented on; *e. g.*, by Lord Moulton in British Columbia *v.* Canada, [1914] A. C. 153. In fact, in one case, the Privy Council refused to answer half the questions. See per Lord Haldane in British Columbia *v.* Canada, [1919] A. C. 164.

[34] Not even the concurrence of the *governments* is sufficient, it will be noted, in Canada.

dividuals. Individuals might maintain their view in the courts, but neither colony was interested in the question, as such. The colony was a mode of government and was totally unconcerned as to what its limits were. In the great *St. Catherine's Case*,[35] Indian tribes had actually released lands to the government of Canada for the benefit of Her Majesty; and the effect was held to be to put them under the control of the government of Ontario. If the King, or the people, tell you to govern South Australia in accordance with the ideas of its population, it does not matter to you whether South Australia covers fifty thousand miles or two thousand. Your job is to govern it — and if you have any doubt of your sphere, then to take the instructions of those who send you.

But section 75(a) of the Australian Act implies that provinces have legal rights, since they can go to law. The governments of South Australia and Victoria therefore very amicably resorted to a true lawsuit in the High Court, like two little country towns. The court, affirmed by the Judicial Committee of the Privy Council, declared in favour of the recognized, though inaccurate, metes and bounds. It is highly important to observe that this was no abstract declaration of right. It was a judgment for possession, and it really seems to an English lawyer inconsistent with legal and constitutional theory. The "possessors" of the land in question were the freeholders. The judgment did not effect, and was not intended to effect, their private rights. True, in the theory of English law, the King is the lord paramount of all land, and, in a sense, may be said to be "in possession." But there has been nothing transferring this eminent domain from the King to something called South Australia, or the state of South Australia. All that has been done has been to enact how the King shall exercise his powers of government there. The King therefore possessed the land in question, in any view of the case. What was really in dispute was, who was entitled to exercise the powers of government over it? That is not "possession," and nothing like it. In awarding "possession," therefore, of the strip between the two boundaries to the successful litigant, the High Court seems to have created a new and rather startling right, under a highly inappropriate name. Suppose two counties are in dispute regarding their respective

[35] St. Catherine's Milling & Lumber Co. *v.* Reg., 14 A. C. 46 (1888).

boundaries — the corporations in charge of their business can sue each other. But it would be absurd if they sued for "possession." Possession is not a word appropriate to denote the exercise of powers of government and regulation — except in International Law.

The whole matter reveals the loose thought and the ambiguous conceptions which pervade modern constitutional theory. "States" are created with liberty to "sue" each other, without anybody's apparently thinking it desirable to ascertain what their rights are to be. A municipality does not own or possess the land and houses within its orbit, though it may quite well own land outside. Yet the province is treated as though it did.

The confusion between the rights of ownership enjoyed by independent states *inter se* and the derivative powers of government committed to municipalities and counties is apparent. The two conceptions meet and form in an aching sea of frothy incertainty. We can see how the American conception, resting on a logical basis of state sovereignty and state allegiance, filtered into Canadian practice as a voluntary and convenient mode of settling intercolonial disputes and difficulties by consent. And we have seen how this was transmuted in Australian practice into the creation of true legal municipal rights residing in the several non-sovereign colonies, without the slightest definition of what those rights were. The result cannot be called satisfactory or creditable; but it is only one example of the universal modern indifference to accuracy in drafting public documents which is making puzzles of our statutes and pitfalls of our treaties.

In South Africa no machinery has been provided for the settlement of intercolonial differences. Professor Caldwell professes to find a difficulty here, and suggests possible resort to the Privy Council [36] by the constituent provinces. But the difficulty does not really exist. If we keep steadily to the constitutional conception of a colony as a geographical expression coupled with a particular channel for the exercise of the powers of government therein, we shall see that there is no need to erect colonies into imaginary persons with rights and obligations in order to get justice done. If

[36] As to *appeals* to the Privy Council from the South African courts, see *per* Dr. Keith in J. Soc. Com. Legis., 3 Series, vol. 2, pt. 3, pp. 328, 331, and Whittaker *v.* Durban there cited and discussed.

territory is claimed as Natalian, it can only be for the purpose of exercising some power of the Natal government therein. Let that asserted power be actively made use of or resisted, and at once some individual has done to some other individual an act which is either a wrong or not, according as the claim is invalid or justified. An ordinary lawsuit will follow, and the Supreme Court of the Union will decide the boundary question. As Dicey has remarked, this habit of deciding constitutional questions incidentally to the decision of concrete cases is peculiarly English, and lies at the root of much that is valuable in English constitutional ideas. Differences between the federation and the colony may not travel as far as Whitehall; but an independent authority (so far as a federal authority can be impartial between the federal and local executives) will decide them. In this simple way many of the leading Canadian constitutional questions have been decided. The validity of the Canadian Temperance Act, 1878, was decided in 1882 by the Privy Council in this fashion, in a private appeal from New Brunswick on a writ of *certiorari* against a conviction by a local justice.[37] The question of the right to escheats in Ontario was decided similarly in *Ontario* (*A. G.*) v. *Mercer*,[38] and many other instances are reported in Cameron's "Canadian Constitutional Cases of the Judicial Committee," including the great cause of *St. Catherine's Milling & Lumber Co.* v. *Reg.*,[39] which involved questions of ownership as between province and federation, and that of *Compagnie Hydraulique* v. *Continental Heat Co.*,[40] which decided that an earlier Canadian statute cannot be overridden by a later provincial one, and thus made Canada supreme over the provinces in their common sphere.

IV

Ownership and Government

When the Crown erects a colony with representative institutions and "responsible" government, the quasi-omnipotence of its legislature obscures the question of its proprietary rights. As the legislature can do pretty well what it pleases — could, in fact, embark on a socialist régime — questions of property assume a

[37] Russell *v.* Reg., 7 A. C. 829 (1882).
[38] 8 A. C. 767 (1883).
[39] 4 A. C. 46 (1888).
[40] [1909] A. C. 194.

secondary importance. But pending legislation, and in federal colonies where the powers of legislation are divided and may be difficult of exercise, the question of state ownership is really a very important one. And it is very difficult.

Unlike the United States, the British imperial system does not start with the hypothesis of corporate units which unite to form the whole. Except in a few instances of Indian princes, the various parts of the empire are mere forms of the activity of the national will, or in legal speech, the Crown. The Crown creates a colony, prescribes its mode of government, leaves that government to work undisturbed, — but never sees in that creation anything legally independent of itself.

What becomes of the Crown lands in such a colony, when representative institutions and "responsible" government have made it practically independent? The answer is, that they were the Crown's before, and they remain the Crown's afterwards. But what is the Crown to do with them? The fact that the executive of the Crown in the colony is responsible to the electorate secures that the lands shall be managed and their revenues applied in a way more or less agreeable to local feeling or local wire-pulling. But this is a subtlety not very easy to translate into legal language. That, by a nice adjustment of enactments and undertakings, the local Crown lands will probably be managed and appropriated by the local Crown servants in a particular way is not a fact which can be fitted in with any of the known legal categories. It can be expressed popularly and roughly by saying that Crown land in British Columbia "belongs to British Columbia" — and the British North American Act, 1867, is not above emphasizing this slipshod and ambiguous expression. But endless difficulties arise when we have to say what it really means.

That the federation and provinces are to this day not regarded as corporations, but as channels of the powers of government, is seen from *Canada* v. *Ontario*.[41] The Canadian government bought out certain Indian rights in Ontario and paid for them. Held, that it was not entitled to be reimbursed by the province. The province was not a corporation which was capable of being benefited and held liable to pay for the benefits. If it has rights and duties,

[41] [1910] A. C. 637.

it has never been laid down what they are; and so far as law and equity are concerned they do not exist.

When the British North America Act, 1867, provided that the Crown lands in Ontario should "belong to Ontario," what did it precisely mean? Apparently it did not intend a grant of the lands, for there was no grantee. Nor did it, apparently, incorporate "Ontario" for the purpose of taking the grant, — as churchwardens are incorporated for the purpose of taking gifts to a parish. Nor did it impose on itself equitable obligations, for equity is not mentioned, and the Crown cannot be bound by anything but clear terms. Lord Watson [42] hinted many years ago that the meaning was only that the right and duty of administration and revenue in regard to the lands was thereby vested in the Crown's ministers for the province. This is a conception difficult to grasp, but it probably approaches the truth. The ministers of the province have the general function of administering public affairs within its borders: it might be thought that this necessarily involved the administration of the Crown lands there, and the perception of their revenues. But these lands are equally situated with the limits of the federal union, so that a conflict would have arisen between the two sets of Crown officials if it had not thus been solved by the provisions of the Act of 1867. The effect of the enactment is thus that the rights of the Crown in respect of its lands shall be exercised through the provincial ministers.[43] The ownership of the land is not changed. The prerogative of the Crown to order its ministers to carry out its wishes is not technically impaired.

Bearing these points in mind, we may approach the *catena* of cases in which British Columbia and the federation were involved, and in which ownership and the powers of government are almost inextricably mixed up.

When the Canadian Pacific Railway was projected, its construction was one attraction held out to British Columbia to induce that province to enter the still young Confederation. British

[42] British Columbia *v.* Canada, 14 A. C. 295 (1889); and see Esquimalt & Nanaimo Ry. Co. *v.* Bainbridge, [1896] A. C. 561.

[43] *Cf.* Ontario Mining Co. *v.* Seybold, [1903] A. C. 73, in which it was held, conformably with this, that the King cannot dispose of Crown lands in a province under the seal of the Dominions. It is a nice point whether his Majesty could do so under the Great Seal of Britain. As the King in Parliament can technically legislate for the province, analogy would seem to indicate the affirmative answer.

Columbia entered accordingly — but the promises held out were slow in being implemented. The province behaved very well in the matter, and displayed considerable patience, which in the end was rewarded. But in the interim, the federation pressed incidental claims against the province, in the decision of which great territorial difficulties arose. The ground of these disputes lay in the fact that British Columbia "conveyed" to the Dominion a forty-mile strip of land across the territory of the province to the sea, for the purpose of railroad construction. Now, was this a conveyance of property or of dominion or of both? Neither party was a corporation, and the land, before and after the transaction, remained simply the Queen's.

Professor Caldwell calls the transaction a "cession;" but it seems perfectly clear that the Queen's servants in the province did not and could not give up to the Queen's servants in the Confederation the rights and duties of government in the "conveyed" area.[44] The arrest of criminals within that area still appears to rest with the provincial authorities. The provincial courts and legislature must have jurisdiction there. There is no "cession" in any reasonable sense of the word. What is transferred is the administrative disposition and revenue of the land, — and I venture to think more than that — probably all the rights which would be exercisable by a private owner.[45] Was this competent?

The King's officers may grant his land, within the limits prescribed by certain statutes, to subjects. But can they hand over their powers of management and the land's revenues to other crown servants? It would seem that this question deserves more close investigation than it appears to have received.

Assuming, however, that such a transfer was possible, and that it was duly effected by the arrangement in question, we find that

[44] Burrard Power Co. *v.* Rex, [1911] A. C. 87, appears at first sight inconsistent with this. All it really decides, however, is that the province must not legislate so as to derogate from its quasi-grant.

[45] Lord Moulton, in British Columbia *v.* Canada, [1914] A. C. 153, calls it "the entire beneficial interest" which passed. But this is to ignore the fact, which Lord Watson saw perfectly well, that it is idle to talk of the "beneficial" interest of agents and servants. Lord Loreburn, in another case (Ontario *v.* Canada, [1912] A. C. 571), shows a truer grasp of principle. "The duty of the Dominion government was not that of trustees [much less beneficial owners] but that of ministers exercising their powers and their discretion for the public welfare." Canada *v.* Ontario, [1910] A. C. 637, 646.

in course of time gold was found in the soil of the land so handed over. Was this gold to be administered and applied by the British Columbia government or the Canadian government? This was the question in *British Columbia* v. *Canada*,[46] and the answer cannot be for a moment doubtful to any one familiar with the rule that gold and silver do not pass from the Crown, unless especially named. It is true that in this case there was no real "conveyance." The gold, like the land, was the Crown's from first to last. But the Crown's ministers had made an arrangement resembling a Crown grant, and it was reasonable to understand it in the same way as if it had been a regular grant to a private person. Professor Caldwell criticizes this decision very adversely — but as it seems to the writer, without substance. He argues that if British Columbia were the representative of the Crown, it is hard to see why she might not alienate gold and silver. It is; and "she" can, — but "she" must do so by appropriate words. It was not, as Professor Caldwell appears to think, that British Columbia acquired the lands from the Crown in two capacities — the land as a private landholder (minus, therefore, the gold and silver), and the gold and silver as a representative of the Crown, — so that when she transferred the land, it was only the land she possessed as a private person, and not the gold and silver which she had as a limb of the Crown. Such would indeed be a truly ridiculous position, and one which, as he says, would tend to cast discredit on the Privy Council. But Lords Watson and Macnaghton were not among the worst of British judges. If they cast discredit on the Privy Council it is hard to see to whom it may look for credit. Professor Caldwell has misapprehended the position. There was no Crown "grant" to "British Columbia" of anything. "British Columbia" — *i. e.*, the Queen's ministers there — disposed of both the land and the gold under precisely the same title — as representatives of the Crown. The only question was, Had they included the gold in their transfer of their powers over the land, or had they not? The answer that they had not may have been right or wrong; but it is clearly not open to criticism based on a supposed "Crown grant" to the province.

Where the learned Privy Councillors erred was rather in failing

[46] 14 A. C. 295 (1889).

to plumb the exact content of the singular situation created by the ministers of the province purporting to hand over their rights and duties within the province to ministers of the Confederation. If this was possible, it was certainly singular. And the resulting transfer was decidedly different from a conveyance. It ought to have been properly distinguished, and the reason for applying to it the same rules of construction as to conveyances ought to have been made clear.

In other cases British Columbia was less fortunate. The water-power and lakes in the transferred belt were held to go along with the land, and to pass under the Dominion administration. We do not suppose that this subtracted them from the provincial laws: it applied however to the discretion conferred on the agents of the Crown within those laws. The regulation of the ports and harbours was held to be in the Confederation apart from the transfer, under its general powers, in *British Columbia* v. *Canada*,[47] and the power of the British Columbia legislature to regulate "civil rights within the province" was held powerless to affect its exercise.

V

Conclusion

Any one who wishes to blaze a track through the complicated maze of British Columbia constitutional law will be safe in holding fast to two great principles. "The Colony" or "The Province" is an entity neither in law nor equity, but only in politics and morals. Its "rights" repose merely on constitutional undertakings, and in particular on the high probability that the Crown's agents in the locality will act in accordance with the preponderance of public opinion there. Disputes between colonies only mean disputes between the agents of the Crown, and can seldom, if ever, concern legal rights. Secondly, the Crown is one and indivisible, though it acts by different agents and on different principles in different parts of the empire. It does not "grant" powers of government or the ownership of land to colonies, or to its servants in

[47] [1914] A. C. 153. The "conveyance" of the forty-mile belt was held to include rights of fishery in non-tidal waters (*i. e.* outside the federal jurisdiction of the Dominion), and the provincial authorities having "conveyed" these, could not derogate from the "conveyance" by the exercise of their undoubted power to legislate for civil rights within the province. Burrard Power Co. *v.* Rex, [1911] A. C. 87.

colonies. Nor, that being so, can colonies or colonial governments grant them to one another. This is the only theory which will hold water; and the tempting analogies of United States practice can only result in utter confusion if they are applied to colonies. For the United States is built up of legally separate entities: whilst the British colonies are only politically such. Loose thinking invokes facile analogy. Sound analysis will demonstrate its danger.[48]

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[48] It is a misleading practice to entitle the reports of cases referred to the courts under the Canadian acts as though they were suits between plaintiff and defendant: "The Attorney General of Canada *v.* The Attorney General of Ontario," "British Columbia *v.* Canada," and so on. It suggests a juridical personality which does not really exist. The proper style, it is submitted, would be "In the matter of a reference by the Governor-General concerning the Dominion and the Province of Ontario" — or as the case might be.